IN THE

Supreme Court of the United States

No._____.

C AND C ICE CREAM COMPANY, INC., - *Petitioner,*

v.

EWING-VON ALLMEN DAIRY COMPANY, INC., NATIONAL ICE CREAM COMPANY, INC., - - - - - - - *Respondents.*

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

On April 4, 1938, the petitioner recovered a judgment in the United States District Court for the Western District of Kentucky against the respondents for $6,000 for an alleged violation of the Clayton Anti-Trust Act in a conspiracy and attempt to monopolize their business which affected interstate commerce, and $750.00 for attorneys' fee (T. R. 34 and 35). Respondents appealed from that judgment to the United States Circuit Court of Appeals for the Sixth Circuit. On February 15, 1940, that Court reversed the judgment of the lower Court holding that the petitioner, plaintiff below, could not recover for the reasons that the transactions complained of did not create a direct

and substantial burden on interstate commerce, and that the ingredients which came from without the State ceased to be a part of interstate commerce when manufactured and sold in Kentucky and were beyond the regulatory powers of Congress; and that it was not shown that there was a conspiracy to restrain such commerce, and that the motion for peremptory should have been sustained.

On the trial of the case it was shown that both the plaintiff and the defendants were engaged in the manufacture of ice cream and shipped it from the State of Kentucky into the State of Indiana; that they both purchased ingredients that go into the making of ice cream—such as cream, butter-fat, fruits, flavoring extracts, gelatin and sugar, outside of the State of Kentucky and had it shipped into the State of Kentucky for the operation and maintenance of their business. That the respondents resorted to the most aggravated and vindictive means to monopolize and run the petitioner out of business, and that they made statements at diver times showing that that was their intention to monopolize this business and run this petitioner out of business (T. R. 53, 58, 72 and 75).

ARGUMENT.

The Sixth Circuit Court of Appeals in reversing this case states:

> "While the bulk of the raw ingredients used by the parties in the manufacture of ice cream comes from Kentucky, the gelatin, fruit and flavoring and part of the cream comes from outside the state. It is not shown that appellants' acts have shown any reduction or monopolization of these supplies."

The case cited in support of that holding—the case of United Leather Workers v. Herkert, 265 U. S. 457, was an injunction, an extraordinary remedy, to restrain a strike; all acts complained of were local and the purpose of the strike was not an attempted monopoly but an effort to improve their conditions and get a better wage. Chief Justice Taft, in the learned opinion, after discussing its relativity to interstate commerce and citing many authorities, said:

> "This view of the case makes it clear that the mere reduction in supplies and articles to be shipped in interstate commerce by the *illegal or tortuous* (italization ours) prevention of its manufacture is ordinarily an indirect and remote obstruction to that commerce. It is only when the intent or necessary effect upon such commerce in the articles is to enable those preventing the manufacturing to *monopolize* (italization ours) the supply, control its price or discriminate between its would be purchaser that the unlawful

> interference with its manufacture can be said directly to burden interstate commerce."

The Sixth Circuit did not apply the facts in this case before the Court to the holdings in the case cited because the facts in this case clearly bring it within the latter part of the opinion quoted.

II.

The Sixth Circuit Court of Appeals in reversing this case, states:

> "It is necessary that appellee prove that the dealings of appellants which form the subject-matter of the complaint operate substantially and directly to restrain and burden interstate commerce. * * * We do not regard the transactions complained of as creating direct and substantial burden on interstate commerce."

They cite for their reason in so holding the case of Santa Cruz Fruit Packing Company v. National Labor Relations Board, 303 U. S. 453. That was an equitable action seeking an injunction or restraining order which alleged a violation of Section 1 of the Clayton Anti-Trust Act which reads as follows to-wit:

U. S. C. A., Title 15:

> "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any such contract or engage in any such combination or

conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $5,000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

This Court in the Santa Cruz case did not hold that the acts complained of must substantially affect interstate commerce, but that they must substantially *relate* to interstate commerce; we quote from Chief Justice Hughes:

> "Where Federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that their is a close and substantial relation to interstate commerce in order to justify federal intervention."

We can understand why the Court did use the words "substantial relation" in that case, because that action sought a restraining order against acts which were wholly local and intrastate and clearly with no intention or interfering with interstate commerce; and to bring acts of that character within the purview of the federal law it must have a substantial relation to interstate commerce. In the present case, however, the complaint charges an attempt to monopolize a business which affects a part of interstate commerce in violation of Section 2 of the Anti-Trust Act. Said section reads as follows:

U. S. C. A., Title 15:

> "Section 2. Every person who shall monopolize or attempt to monopolize, or combine or con-

spire with any other person or persons, to monopolize *any part* of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

In the wording of this Section, Congress does specifically say what part of the trade or commerce among the several States must be affected. Apparently in order to prevent the Courts from construing that section to mean a certain per cent or a substantial part, they say, "*any part* of the trade or commerce among the several States." In other words, Congress in enacting that law must have had in mind as the primary purpose of it the preservation of fair and legitimate competition. They evidently regard fair competition as a necessary incentive to business and industry, because they specifically state that every one who shall monopolize or attempt to monopolize *any part* of the trade of interstate commerce has committed a crime. Congress evidently regarded fair and legitimate competition so sacred to industry and business that it said in Section 2 of this Act, that if anyone attempt to monopolize any business and it affects any part of interstate commerce he shall be guilty, etc. Congress did not say, affect fifty per cent, or twenty per cent, or a substantial part, but it affects *any part* of interstate commerce.

If Congress in Section 2 instead of using the terms they did use, "any part," had used the phrase "not less than 10 per cent" then if the evidence in the case showed that only 9½ per cent of the business was affected, it would clearly not come under the Act; or if they had used the phrase "a part of interstate commerce" it might have been construed to mean a substantial part, but in view of the language used and the wording of the Section as a whole, we take it that Congress meant to say just what it did say; and for the Court to construe that to mean a "substantial" part would be judicial legislation. If an attempted monopolization affects any part of interstate commerce, it brings it within the jurisdiction of the United States Court and the facts in this case clearly show, beyond the peradventure of a doubt, that it did affect and burden, to say the least, that part of petitioners' business that was in interstate commerce leaving entirely out of the picture the ingredients that go into the manufacture of ice cream. It affected and burdened that part of petitioners' business in Indiana and even that part alone is enough to give the Federal Court jurisdiction of this character of an action, to-wit: an attempt to monopolize a business affecting any part of interstate commerce. In other words, in Section 2 of this Act, Congress intending to give Federal Court jurisdiction in such cases where an unlawful and unfair attempt to monopolize a business affecting any part of interstate commerce in order to break up the vicious and unlawful monopolization of industries that prevented a fair and legitimate competition in that busi-

ness. The history of the interstate commerce Act shows that its purposes were to encourage a fair competition in business.

> Apex Hosiery Company v. Wm. Leader & Am. Fed. of Hosiery Workers, 9205, decided May 27, 1940 (U. S. C.).
>
> "In order to establish violation of the Sherman Anti-Trust Act it is not necessary to show that the challenged arrangement suppresses all competition between the parties or that the parties themselves are discontented with the arrangement. The interest of the public in the preservation of competition is the primary consideration."
>
> Paramount Famous Lasky Corporation v. United States, 282 U. S. 30, 75 L. Ed. 145.

In the recent case of Indiana Farmers Guide Publishing Company v. Prairie Farmers Publishing Company, 293 U. S. 268, a violation of Section 2 as well as Section 1 was alleged just as in this law suit before the Court now. The District Court and the Circuit Court of Appeals held the complainants were not entitled to recover because the evidence only showed about 10 per cent of plaintiff's business was affected. This Honorable Court, in reversing the lower Court, said:

> "Its right to recover does not depend upon the proportion that respondents control of the total farm paper advertisements in the entire country, and it was not required to prove that respondents imposed a restraint or attempted monopolization that would affect all commercial advertisements in all farm papers wherever pub-

lished or circulated. The provisions of Sections 1 and 2 have both a geographical and distributive significance and apply to any part of the classes of things forming a part of interstate commerce."

In the very recent case of Peto v. Howell, 101 Fed. (2d) 353, Seventh Circuit, which was a suit to recover damages for an attempt to monopolize a business affecting a part of interstate commerce, all of the acts complained of were local in Chicago, Illinois; and the only evidence showing an effect on interstate commerce was the fact that they did monopolize the business and in that way the Court decided that that reduced and curtailed the market on corn shipped into Chicago. The Seventh Circuit Court holding that that was within Section 2 of the Anti-Trust Act said:

> "Monopoly is the acquisition of something for one's own self, not necessarily the whole of a given commodity or the whole commerce therein but control, at least, of a part thereof sufficient to constitute withholding from the public the right to deal therein in an open market. As has been said, Congress had chiefly in mind not so much the monopoly of the whole as the much more likely case of a monopoly of a smaller part."
>
> Peto v. Howell, 101 Fed. (2d) 353, citing Standard Oil Co. v. U. S., 221 U. S. 1, 55 L. Ed. 619.

In all the strike cases that have been handed down, the complaint charges a violation of Section 1 of the Anti-Trust Act, and this Court, and most all courts, have properly held that local acts to restrain inter-

state commerce must show that the acts complained of must directly and substantially affect interstate commerce. But where the complaint charges a violation of Section 2 or a monopolization it is different, because in that section Congress was striking at monopolies and trying to encourage and protect legitimate and fair competition, and if it affects *any part* of interstate commerce it comes within the purview of the Federal Act.

III.

We think the Sixth Circuit Court of Appeals erred in the judgment of February 15, 1940, holding that:

> "The ingredients which came from without the state ceased to be a part of interstate commerce when manufactured and sold in Kentucky and were beyond the regulatory powers of Congress."

If that were true, still it could not be said that the monopolization complained of in this law suit would not affect and burden the interstate commerce of these articles before they were manufactured into ice cream. In Local 167 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America v. United States, 291 U. S. 292, all the acts complained of were local in New York. This Honorable Court said in that case:

> "It might be assumed that some time after delivery of carload lots by interstate carriers to the receivers, the movement of the poultry ceased to be interstate commerce. But we need not decide

> when interstate commerce ends and that which is intrastate begins. The control of handling, the sales and the prices at the place of origin before the interstate journey begins or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce * * *. The Sherman Act denounces every conspiracy in restraint of trade including those that are to be carried on by acts constituting intrastate transactions."

That language is so strong, so clear and so convincing that it needs no comment. We could not use language that would be more convincing that the Sixth Circuit Court of Appeals erred in this case so holding as above quoted. The case at bar is a monopoly case and, therefore, much stronger.

IV.

We think that the lower court erred in its opinion that the facts in this case did not show in any way that they affected interstate commerce.

In the present case, the evidence is convincing that both parties were engaged in interstate commerce, both selling and buying, in the operation of these businesses (T. R. 53, 58, 72 and 75). If one party attempts to or does monopolize and run the other out of business, does that not affect interstate commerce? Does it not check the free flow of interstate commerce? Does it not reduce and monopolize these supplies? Would it be necessary for complainant to prove that running competitors out of business would reduce the market in

that territory? Is not that one of the things that is self-evident; that if a competitor monopolizes a business in a certain territory that that reduces the income and outgo of the commodity used in that business in that territory and defeats the very purpose of the Anti-Trust Act. To say, in the face of the facts, that it is not shown that the interstate shipments of these things were affected, is like saying that it was not shown that John Smith was affected financially when he was robbed, or it was not shown that a man's house was not a fit habitation after it was burned to the ground. There is no denying that this monopolization of the ice cream business affected the free flow in interstate commerce of butter fat, cream, fruits, flavoring extracts, gelatin and sugar. It reduced the demand of these things, and of course, the income and outgo of them. Furthermore, in view of the amount shown, two stores of petitioners in Indiana and two stores of respondents in Indiana and more than 15 carloads of ingredients shipped into Kentucky each year, shows a substantial amount. It affected and burdened the shipment of ice cream from Kentucky to Indiana, it curtailed and interfered with free competition, even though the competition in Indiana was not so strong as it was in Kentucky. It does not make any difference if there was no competition in the State of Indiana if the respondents attempted to or did monopolize the ice cream business in Kentucky, they did away with petitioners' entire business, and stopped the flow of interstate commerce, of that part of petitioners'

business going from Kentucky to Indiana. The evidence showed (T. R. 58) that petitioner had some stores in the State of Indiana and that the business transacted by petitioner in the years 1934 and 1935 ran from $138.00 to $1,423.00 per month per store, of all stores in Kentucky and Indiana.

V.

The Sixth Circuit Court of Appeals held that:

> "Competition between the parties in Louisville, Jefferson County, in no way affected interstate commerce, and the record contains no proof of conspiracy to restrain such commerce."

Citing as authority for that holding, the case of Lipson v. Socony Vacuum Corporation, 87 Fed. (2d) (C. C. A.) 1. In the case cited the only question raised was the sufficiency of the allegations in the petition. The lower Court having sustained a demurrer to the petition and dismissed the case, it was appealed upon that one question; and from a reading of the case, we cannot help but think that it was a typographical error to cite that decision in support of this finding.

Of course, if it had been a fair and legitimate competition and all the acts were in Louisville, Kentucky, and the complaint had only charged a conspiracy in restraint of commerce, the Sixth Circuit Court's holding might be sound, but in this action before the Court, there was no resemblance to a fair or a legitimate competition. The record in this case shows a most

aggravated and vicious attempt to *monopolize* the business by running a competitor out of business. It was not necessary that complaint in this action show a conspiracy to restrain commerce if the record showed, and it does show, that the respondents conspired together and did attempt to *monopolize* this business by unlawful and unfair tactics, then it was within the purview of Section 2 of the Anti-Trust Act and those facts also show an interference with the free flow of interstate commerce. From the evidence in this record, there can be but one conclusion and that is the defendants conspired, that is to say, had a working understanding with each other, to do the very things that they did do in monopolizing this business and those acts were in violation of Section 2 of the Anti-Trust Act and affected and interfered with the free flow of interstate commerce.

> "Intent to restrain interstate trade is presumed where it is the necessary result of things done or contemplated."
>
> International Organized United Mine Workers of America v. Red Jacket Consolidated Coal and Coke Company, 18 Fed. (2d) 839.

CONCLUSION.

We think the finding of the Circuit Court below is not the law and was in direct conflict with the opinions of the Supreme Court of the United States and creates a conflict of the decisions of the Circuit Courts of Appeals, and that it was evidently misled by overlooking the fact that the Santa Cruz Fruit Packing Company v. National Labor Relations Board, cited, was not at all in line with this action for damages, but was on an entirely different proposition. The facts in this case certainly justified a submission of petitioner's cause to the jury. The jury found for the plaintiff and the verdict was not flagrantly against the evidence. We respectfully ask that the opinion of the Sixth Circuit Court be reversed and the judgment of the lower Court affirmed.

Respectfully submitted,

JOSEPH S. LAWTON,
JOSEPH SOLINGER,
CLAUDE HUDGINS,
Attorneys for Petitioner.